Filed 3/10/09 P. v. Swanson CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ERIK JAMES SWANSON,<br><br>Defendant and Appellant. | B206352<br><br>(Los Angeles County Super. Ct. No. VA097360) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Schuur, Judge. Affirmed.

Koryn & Loryn and Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Lawrence M. Daniels and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Erik James Swanson, charged with six counts of committing lewd acts against minor K., was convicted by a jury of counts 2 and 5—a lewd act upon a child in violation of Penal Code section 288 subdivision (a),[1] and a lewd act upon a child by force in violation of section 288, subdivision (b), with a special finding that defendant had substantial sexual contact with the victim (§ 1203.066, subd. (a)(8)). The trial court imposed the upper term of eight years for the lewd act by force and a consecutive two-year middle term for the non-forcible lewd act. In his timely appeal, defendant contends: (1) the court admitted evidence of a prior violent sexual offense in violation of Evidence Code section 352 and his constitutional rights to a due process and a fair trial; (2) Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM No. 1191, the pattern instruction for considering evidence of an uncharged sexual offense, violated his constitutional rights to a due process and a fair trial; and (3) the court violated his Sixth Amendment jury trial right by imposing the upper term without a jury finding on the aggravating factors pursuant to *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296, 301 (*Blakely*). We disagree and affirm.

## STATEMENT OF FACTS

K. was 12 years old at the time of trial. When she was nine or ten years old, she lived at the Sherwood Apartments in Bellflower with her parents and younger brothers. Defendant was her uncle, who lived with them at the apartment. Defendant made her hold his penis and move her hand "up and down." He also had her "cover up [his] private part with [her] mouth." Such incidents occurred on a weekly basis.

One day, while K. was playing with her brother, defendant said he had a "surprise" for her. He took her to the bedroom and closed the shades. When she asked why, "he said he didn't want anybody to see the surprise." He pulled down his pants,

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[1] All further statutory references are to the Penal Code, unless noted otherwise.

exposing his penis. When he told her to masturbate him, she tried to leave the room, but defendant pulled her back and "made" her perform the sex act on him. On another occasion, when she was wearing only a towel after showering, defendant ordered her to remove the towel. He touched her genital areas and masturbated until he ejaculated—as he had done previously when she was forced to masturbate him by hand and orally copulate him. K. recalled three or four such incidents. She had tried to leave the room each time, but defendant pulled her back.

She did not tell anyone about the sexual assaults because she was afraid defendant would "do something" to her. Detective Doug Kimura, who had a great amount of experience with child sexual assault investigations, testified that it is common for children to delay reporting such incidents.

K.'s mother, R. L., testified that defendant began living at their apartment when K. was nine years old. After defendant moved out, K. disclosed what defendant had done to her. R. L. informed the police.

**Prior Sexual Offense**

On October 26, 2002, when Elizabeth[2] was 21 years old, she worked at a group home called the Olive Quest Treatment Center. She was the only staff member at the center that morning. Defendant, then 16 years old, was alone with her in the living room. He asked her to "have sex" with him. She firmly declined and told him why it would be inappropriate. Defendant returned to his room. Elizabeth went to the office to do paperwork. Within a few minutes, however, defendant approached her. He appeared upset. When she asked why, he said it was because she had rebuffed his advances. Elizabeth repeated that it would be inappropriate, but defendant grabbed her from behind, pulled out a kitchen knife, held the blade to her neck, and repeatedly demanded that she have sex with him. She feared for her life and asked him to put down the knife so they

[2] We refer to the witness by first name only to preserve her privacy interests.

could talk, but defendant refused. Eventually, however, he relented and allowed her to take the knife away. Elizabeth called the police.

**Defense**

Defendant testified that he lived with K.'s family from June 2004 to January 2005. He admitted committing the sexual assault against Elizabeth. He was 16 years old at the time. "It was a stupid mistake." He apologized to Elizabeth afterwards. While he lived in the victim's apartment, he worked regularly. He was never alone with K., and he denied ever sexually assaulting her. He had a girlfriend at the time.

## DISCUSSION

**Prior Sex Crime**

Defendant contends the trial court admitted evidence of his attempted rape of Elizabeth in violation of Evidence Code section 352 and his constitutional rights to a due process and a fair trial. More specifically, defendant argues the trial court abused its discretion and caused him irreparable prejudice because the circumstances of the prior attempted rape were so different from those of the charged offenses, both in terms of the victims' ages and the nature of the offenses. We disagree and find neither evidentiary error nor constitutional violation.

In a hearing outside the jury's presence, the prosecution moved pursuant to Evidence Code section 1108 to introduce evidence of defendant's prior sexual offense, which was described as an attempted rape of an adult woman in 2002, when defendant was a minor. Defendant opposed the motion, arguing the evidence lacked probative value and was unduly prejudicial under Evidence Code section 352. The trial court indicated its inclination to grant the prosecution motion, but deferred ruling to give the parties more time to brief the issue. Ultimately, the court ruled the evidence admissible,

relying on *People v. Cromp* (2007) 153 Cal.App.4th 476 (*Cromp*). The court found the evidence highly relevant to the two counts alleging forcible sexual abuse and more probative than prejudicial.

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense . . . is not made inadmissible by [Evidence Code s]ection 1101,[3] if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." In *People v. Falsetta* (1999) 21 Cal.4th 903, 914-917 (*Falsetta*), our Supreme Court held the limited exception for admitting evidence of a propensity to commit sexual offenses under Evidence Code section 1108 does not violate due process, particularly when the evidence is subject to the weighing process of Evidence Code section 352. (Cf. *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1025-1031 [upholding analogous federal evidentiary rule—Federal Rule of Evidence, rule 414—against due process and equal protection challenges].)

We review relevancy and Evidence Code section 352 rulings for abuse of discretion. (*People v. Siripongs* (1988) 45 Cal.3d 548, 574.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.) In *People v. Abilez* (2007) 41 Cal.4th 472, our Supreme Court made it clear that prior sex offenses were not to be considered inherently prejudicial: "'Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible *remoteness,* the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, *its similarity to the charged offense,* its likely prejudicial impact on the jurors, the burden on the defendant in defending against

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[3] Evidence Code section 1101, subdivision (a) provides, subject to an array of limitations and exceptions, that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.]" (*Id.* at p. 502, quoting *Falsetta, supra*, 21 Cal.4th at p. 917.) The *Falsetta* decision had explained that in applying Evidence Code section 1108, "courts will retain broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value. [Citations.]" (*Falsetta, supra,* 21 Cal.4th at p. 919.)

Our review of the record reveals no abuse of discretion by the trial court. Defendant asserts the sex crimes against Elizabeth and K. were entirely dissimilar because the former involved defendant as a minor using a knife against an adult, while the latter involved him as an adult using no weapon to commit sex crimes against a minor. Defendant's interpretation of the record is overly simplistic. When defendant attempted to rape Elizabeth, he may have been legally underage, but his conduct was not the behavior of a child. Similarly, while Elizabeth was not a child, she was a female alone with defendant—and defendant, in trying to rape her, used a knife to render her as vulnerable as K. would be a few years later. As the prosecutor argued, those were pertinent similarities between the crimes. Moreover, as the court recognized, defendant's willingness to use force against Elizabeth was highly relevant to the force allegation as to the offenses against K. (See *Cromp, supra,* 153 Cal.App.4th at p. 480 ["The fact that defendant committed a sexual offense on a particularly vulnerable victim in the past logically tends to prove he did so again with respect to the current offenses"].) Accordingly, the dissimilarities between the earlier sexual assault and the charged acts on the victim went to the weight, not the admissibility, of Elizabeth's testimony. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)

We further note that other legitimate considerations favored admission of the prior crime. The offenses were hardly remote in time, and Elizabeth's testimony—which took a relatively short time to present—was straightforward and had no tendency to confuse the issues. Nor do we agree that the prior crime was "more inflammatory than the

charged offenses." (*People v. Branch* (2001) 91 Cal.App.4th 274, 283.) Elizabeth was not a child victim and defendant's crime against her remained inchoate.

Defendant's case was unlike *People v. Harris* (1988) 60 Cal.App.4th 727 (*Harris*), where "the defendant, a mental health nurse, was charged with several sexual offenses after he allegedly took advantage of two emotionally and physically vulnerable women in his care. [Citation.] At trial, the prosecutor introduced evidence of the defendant's prior violent criminal behavior through the testimony of two police officers. [Citation.]" (*People v. Wesson* (2006) 138 Cal.App.4th 959, 970 (*Wesson*).) *Harris* is distinguishable not only because the prior sex offense was remote in time (having occurred 23 years before the charged offenses), but the nature of the prior crime was "'inflammatory in the extreme.'" (*Ibid.*, citing *Harris, supra*, at p. 738.) In sum, we find *Harris* distinguishable because the factors in favor of admission predominated in defendant's case. (See *Wesson, supra*, at pp. 969-970.)

The admission of Elizabeth E.'s testimony did not cause defendant to suffer prejudice in the legal sense. "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Morton* (2008) 159 Cal.App.4th 239, 249.) Moreover, further diminishing the potential for undue prejudice, the trial court instructed the jury that the prior act evidence was insufficient by itself to prove his guilt of the charged offense and that the prosecution was still required to prove each element of the charged offense beyond a reasonable doubt, pursuant to pattern instruction CALCRIM No. 1191.

Defendant's "very narrow due process argument on appeal" fails in light of our foregoing analysis. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (E.g., *id.* at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *Falsetta, supra,*

21 Cal.4th at p. 913.) Here, the challenged evidence was properly admitted on relevant, nonprejudicial grounds. (See *Falsetta, supra,* at p. 913.)

**CALCRIM No. 1191**

For the purpose of preserving the claim for potential review in federal court, defendant urges a claim that our Supreme Court rejected in *People v. Reliford* (2003) 29 Cal.4th 1007, 1009, 1011-1116—that a jury instruction as to the consideration of prior uncharged sexual offenses, consistent with Evidence Code section 1108, violated his constitutional rights to a due process and a fair trial. Although *Reliford* assessed the claim in light of a prior version (CALJIC No. 2.50.01) of the pattern instruction used in defendant's trial (CALCRIM No. 1191), the pertinent language in both is identical. We are confident that the reasoning of *Reliford* applies equally to defendant's challenge and conclude we are bound by the analysis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

**Upper Term Sentence**

Defendant's sentencing hearing took place on February 27, 2008. The trial court imposed the eight-year upper term for violating section 288, subdivision (b), finding in aggravation that the offense "involved violence" and the minor victim was "vulnerable." The court found no circumstance in mitigation. Defendant asserts the court violated his Sixth Amendment jury trial right by imposing the upper term without a jury finding on the aggravating factors pursuant to *Cunningham, supra,* 549 U.S. 270 and *Blakely, supra*, 542 U.S. 296. That argument fails in light of the fact that defendant was sentenced under the Determinate Sentencing Law (DSL) as it had been amended effective March 30, 2007 (§ 1170, as amended by Stats. 2007, ch. 3, §§ 2, 7).

The Legislature amended the DSL in response to *Cunningham*. (*People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2 (*Sandoval*).) The Legislature adopted

"*Cunningham's* suggestion that California could comply with the federal jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

The DSL amendments afford trial courts the discretion under section 1170, subdivision (b), to select among the lower, middle, and upper terms specified by statute without stating ultimate facts deemed to be aggravating or mitigating under the circumstances and without weighing aggravating and mitigating circumstances. (*Sandoval, supra,* 41 Cal.4th at p. 847, citing former § 1170, subd. (b).) Thus, effective March 30, 2007, "a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions." (*Sandoval, supra,* at p. 848.) The *Sandoval* court held it is constitutionally appropriate to apply the amended version of the DSL in all sentencing proceedings conducted after the effective date of the amendments, regardless of whether the offense was committed prior to the effective date of the amendments. (*Id.* at pp. 845-857.) We are bound by *Sandoval*. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)

As defendant was sentenced after the effective date of the DSL amendments, his reliance on *Cunningham* is misplaced. The trial court was entitled to impose the upper term based on any significant aggravating factor, unless an exception applied. The record supports the court's exercise of discretion in finding two statutorily-recognized aggravating factors—victim vulnerability and that defendant engaged in violent conduct indicative of being a serious danger to society. (Cal. Rules of Court, rule 4.421(a)(3), (b)(1).) On the other hand, there is nothing in the record supportive of mitigation. The discretionary upper term sentence imposed was not an abuse of discretion.

## DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.